in the
Supreme Court
of the
United States

OCTOBER TERM, 1971

Supreme Court, U.S.
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NO. 70-5012

GEORGE WILLIAM MILTON,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,

Respondent.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit

BRIEF OF RESPONDENT

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INDEX

	Page
QUESTIONS PRESENTED	2
SUMMARY	3
ARGUMENT	
Question I	4
The Allegedly Inadmissible Confession Could, At Most, Constitute Harmless Error in View of the Prior Confessions and the Overwhelming Evidence at Petitioner's Trial.	
Question II	11
Assuming Arguendo That The Question of the Admissibility of the Prior Confessions will be Reviewed By This Court, the Voluntariness of the Prior Confessions was Appropriately Determined By Procedures Specifically Authorized By This Court.	
Question III	21
Assuming Arguendo That This Court Does Review The Earlier Confessions And Does Decide That Inappropriate Procedures Were Employed To Determine The Voluntary Nature Of Those Earlier Confessions, The Principle Of Right To Counsel Encompassed By *Massiah* Should Not Be Extended To Apply To Petitioner's Later Confession To Archie Langford.	

INDEX (cont.)

Page

A. Because of the particular facts of this case

B. Because the petitioner had a full hearing as to the voluntary nature of his statements

C. Because the petitioner himself denied coercion at the time of the trial

Question IV 23

If This Court Deems It Necessary To Consider The *Massiah* Decision, Despite The Preceeding Arguments, The Principle of The Non-Retroactivity Of *Massiah* Should Be Upheld.

A. There is general agreement among the Circuit Courts that a normal application of *Massiah* means prospective application.

B. A retroactive application of *Massiah* would be inconsistent with prior similar decisions.

Question V 28

A Review Of The Procedures Employed In The Lower Courts Explicitly Supports The Conclusion That Defendant's Statements To Archie Langford Were Voluntary And Admissible.

CONCLUSION 33

CERTIFICATE OF SERVICE 34

TABLE OF CITATIONS

Case	Page
Bynum v. State of Illinois, 373 U.S. 528 (1963)	32
Chapman v. California, 386 U.S. 18 (1967)	5
Davis v. North Carolina, 384 U.S. 737 (1966)	29, 30
Davis v. North Carolina, 253 N.C. 86, 116 S.E.2d 365 (1966)	31
Desist v. United States, 394 U.S. 244 (1969)	26
Escobedo v. Illinois, 378 U.S. 478, (1964)	27
Gilbert v. California, 388 U.S. 263, (1967)	27
Graham v. State, 91 So.2d 662 (Fla. 1956)	11
Harrington v. United States, 395 U.S. 250 (1969)	5
Jackson v. Denno, 378 U.S. 368 (1964)	11, 23

TABLE OF CITATIONS (cont.)

Case	Page
Johnson v. New Jersey, 384 U.S. 719, (1966)	25, 26, 27
Lawn v. United States, 355 U.S. 339 (1958)	9
Lyles v. Beto, 363 Fed.2d 503 (1966)	24
Milton v. Cochran, 147 So.2d 137 (1963)	32
Milton v. State, 125 So.2d 880 (Fla. 1960)	9
Milton v. Wainwright, 306 F.Supp. 939 (So. Dist. Fla. 1969)	24
Milton v. Wainwright, 428 F.2d 463 (1970)	28
Miranda v. Arizona, 384 U.S. 436 (1966)	27
Namet v. United States, 373 U.S. 179 (1963)	9
National Licorice Company v. National Labor Relations Board, 309 U.S. 350 (1940)	10

TABLE OF CITATIONS (cont.)

Case	Page
Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376 (1960)	10
Rogers v. Richmond, 365 U.S. 534 (1961)	32
Townsend v. Sain, 372 U.S. 293 (1963)	28, 31, 32
U.S. ex rel. Allison v. New Jersey, 418 F.2d 332 (1969)	24
U.S. ex rel. Dickerson v. Rundle, 430 F.2d 462 (1970)	24
U.S. ex rel. Long v. Pate, 418 F.2d 1028 (1970)	24
U.S. ex rel. Romano v. Fay, 360 F.2d 389 (1966)	24
United States v. Wade, 388 U.S. 218, (1967)	27
Young v. United States, 107 F.2d 490 (5th Cir. 1939)	25
Young v. Wainwright, 326 F.2d 255 (5th Cir. 1964)	32

TABLE OF CITATIONS (cont.)

OTHER AUTHORITIES

	Page
United States Supreme Court Rule 40 (d) (2)	10
Florida Statute 901.23	32

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BRIEF OF RESPONDENT

QUESTIONS PRESENTED

I

WOULD THE ALLEGEDLY INADMISSIBLE CONFESSION CONSTITUTE A BASIS FOR REVERSAL IN VIEW OF PRIOR UNCHALLENGED CONFESSIONS AND THE OVERWHELMING EVIDENCE OF GUILT?

II

ASSUMING THAT THE QUESTION OF THE ADMISSIBILITY OF THE PRIOR QUESTIONS WILL BE REVIEWED BY THIS COURT, WAS THE VOLUNTARY NATURE OF THE PRIOR CONFESSIONS APPROPRIATELY DETERMINED BY PROCEDURES SPECIFICALLY AUTHORIZED BY THIS COURT?

III

SHOULD THE PRINCIPLE OF RIGHT TO COUNSEL ENCOMPASSED IN *MASSIAH* BE EXTENDED TO THIS CASE?

IV

SHOULD *MASSIAH* BE APPLIED RETROACTIVELY?

V

WOULD A REVIEW OF THE PROCEDURES EMPLOYED IN THE LOWER COURTS SUPPORT THE CONCLUSION THAT THE STATEMENTS TO ARCHIE LANGFORD WERE VOLUNTARY AND ADMISSIBLE?

SUMMARY

This summary is designed to constitute a brief recapitulation of the issues in this case. Citations of authority have been omitted insofar as they appear in the more detailed argument portion of this brief. The State has attempted to reconstruct the issues to reflect that which is, hopefully, a more accurate view of this case.

First, it is our contention that the allegedly inadmissible confession, if in fact inadmissible, would merely constitute harmless error. There are other, prior, confessions elicited from the defendant which are not challenged in this appeal. Further, there was overwhelming evidence against the defendant. In view of those factors, the single confession being challenged could, at most, constitute harmless error.

Second, the question of the admissibility of the earlier confessions was determined by procedures specifically mandated by this Court. Neither those procedures, nor the conclusions arrived at through these procedures, have been effectively challenged. Therefore, it is clear that the voluntariness of those confessions is not subject to further dispute.

Third, it is, in view of the above arguments, not necessary to consider whether *Massiah* applies to this case. However, if such is considered, it is clear that it is undesirable to extend the facts of *Massiah* to the case at bar. Such an extension would put serious restrictions upon the introduction of virtually all evidence which is voluntarily given.

Fourth, it should not be necessary to consider the retroactivity of *Massiah* in view of the arguments above. However, if that question is considered, the decisions of the Circuit Courts applying *Massiah* prospectively should be affirmed. Failing to do so would adversely affect our system of criminal justice according to standards set forth by this Court. It would also lead to unwarranted confusion in view of the prospective applications of *Miranda and Escobedo.*

Fifth, by no stretch of the imagination could the statements to Officer Langford be deemed involuntary in accordance with general standards existing prior to *Massiah.* No coercion of any type was alleged by the prisoner at the time of trial. No coercion of any type is documented by petitioner in his brief.

I

THE ALLEGELDY INADMISSIBLE CONFESSION COULD, AT MOST, CONSTITUTE HARMLESS ERROR IN VIEW OF THE PRIOR CONFESSIONS AND THE OVERWHELMING EVIDENCE AT PETITIONER'S TRIAL.

The major thrust of the petitioner's argument in the Federal Courts has been that his statements made to Archie Langford in the jail cell should have been excluded. Before considering the merits of that contention, it is important to note that this issue if resolved by this Court in favor of the defendant, would provide the defendant with no possible basis for belief. That such a determination would be moot is clear from a review of all the facts of

this case. In addition to the disputed statements, there are several prior confessions, as well as other overwhelming evidence of guilt. Therefore, if this Court should decide to reverse the lower Court's holding regarding the admissibility of the confession, it would, at most, constitute harmless error. *Harrington v. United States*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

An examination of the trial record strongly urges the conclusion that none of the confessions would have been necessary to obtain a conviction. There is ample and conclusive evidence to establish the charge that the events of June 1, 1958 constituted no accident but, rather, premeditated murder.

The State proved that the defendant was hauled out of the Miami River in the early morning hours of June 1, 1958. Cedric Meton testified that he resided on a yacht called "Ladama" which is docked at the Miami River at 385 N.W. South River Drive and that he heard a call for help from the river at approximately 3:03 in the morning. Meton pulled the defendant out of the water and called the police (R. 101-102). Meton testified that the boats along the river bank formed a solid line except for a *single gap* of approximately twenty-five feet in length (R. 100-101).

Meton further testified that he was present the next morning when a car was pulled out of the river (R. 105). Meton observed that the windows in the car were up and that a body was taken out of the car (R. 111-112). The body, was, of course, that of Minnie Claybon who had, according to the medical examiner, died of drowning (R. 76-85). Meton also observed that the police had to

break into the car with tools (R. 112-113). Police officer Lawrence McGraw arrived at the scene at approximately 3:32 in the morning of June 1, 1958 and found the defendant, the man Meton pulled out of the river, lying on the pavement (R. 145-150). McGraw testified that when he saw the defendant lying there on the pavement that he, the defendant, kept insisting that he drove his car into the river. McGraw's testimony in this regard is reflected in the record as follows (R. 148):

> "Q When you saw this defendant lying on the pavement describe if you will, what he was doing, what he was saying, if anything.
>
> A Well, he kept insisting that he drove his car into the river."

The police dragged the bottom of the Miami River with grappling hooks to locate the car. Wesley Curt Speakman of the Harbor Patrol of the Miami Police Department testified that the search for the car on the river bottom began at 6:36 on the morning in question (R. 158). The car was located and Speakman testified that he dove down and attached the hooks to the undercarriage of the car (R. 159). Speakman testified that the front and rear windshields were intact and that the two back windows were rolled up and that the window in front on the passenger side was partially open. Speakman stated that it was too murky on the bottom to see inside the car. Speakman testified that the rear doors of the car had to be pried open because there was a latch screwed over the outside of the doors (R. 165 & 167). Speakman further testified that a body of a Negro female was discovered on the back seat of the car (R. 168).

Detective Shepherd of the homicide bureau of the Miami Police Department testified that he saw the car pulled out of the Miami River at approximately 10:15 in the morning (R. 241-242). Shepherd examined the car immediately after it was pulled out of the river and determined that the rear doors could not be opened. The rear doors had a latch prohibiting them from opening. Shepherd testified that the rear doors had to be broken into with a hammer. (R. 242). Shepherd explained the operation of the latch establishing that it could only be put in a locked position by someone actually screwing the guide screw and resetting it by screwing it back after the latch was put in locked position (R. 244). This establishes that the latch had to be put in the locked position by a human agency and could not accidently fall into that position. One of the latches taken from the car was identified and admitted into evidence (R. 251). Shepherd also testified that the distance from the entrance of the parking lot to the river edge where the car went in was fifty-eight (58) feet and that the only opening at the river edge where boats were otherwise solidly docked was seventeen (17) feet in width.

The State proved that the automobile in question belonged to the defendant and was purchased by him approximately *nine (9) hours* before it was driven into the river. Robert Simmons and Ed Griffin of Griffin Motors both testified that the defendant purchased the car in question some time between five and six o'clock on the evening of May 31, 1958 (R. 217-234). The prior owner of the car, Henry M. Paula, testified that he had traded the car in question to Griffin Motors in May, 1958 and that the car had the ornaments or latches attached to it at that time. Paula testified that the latches did not obstruct the

opening of the rear doors and that they were solidly fixed to the car (R. 237).

The State proved through the testimony of two insurance agents, namely Paul Gilman Smith of the Independent Life and Accident Insurance Company and Louis Bromberg of the United Insurance Company of America, that the defendant was the beneficiary of an insurance policy on the life of the defendant (R. 184-227). The insurance policies provided for Seven Thousand Five Hundred Dollars ($7,500.00) in the event of accidental death. The insurance agents testified that the defendant paid the premiums and that they were current.

The State proved that at the time the defendant was seeing and subsequently living with the deceased he was cavorting with one Lucille Williams, promising her that he was soon to come into some money and that he would marry her and take her to New York (R. 278-290). A friend of the defendant's, J. D. Reid of Haines City, where the defendant and the deceased formerly lived, testified that the defendant on several occasions stated that he did not like the deceased but that he needed her money to advance his boxing career. The defendant made it quite clear to Reid that all he wanted from the deceased was money. An example of Reid's testimony in that regard reads as follows (R. 182):

> "Well, George was constantly telling me that he didn't care anything for Minnie, didn't have any love nor likes for her. She had a job during the time. He needed money, he needed money to finish his boxing career. He could get anything he wanted from her. That was all he wanted from her was the money."

Up to this point in the evidence the state proved a case which pointed directly and convincingly to the conclusion that the defendant drove his car into the Miami River with the premeditated design to kill the deceased so that he could collect the insurance proceeds. The evidence clearly demonstrating the motive and the circumstances leaves no other reasonable hypothesis than that the defendant latched the rear doors of his car, closed the windows in the back of the car during the hot month of June with the deceased in the rear seat so that she could not escape, and directed the car into the river.

The State then introduced the defendants confessions which had been elicited prior to the conversation with Archie Langford. Counsel for the petitioner asks why the State was intent upon obtaining five confessions. In fact, the first four series of confessions were virtually one and the same. The confession was given orally and then transcribed by a stenographer (R. 393). The defendant asked to change it, but *only in regard to clarifying his motive for the killing*. The taped version was presented to the jury.

This confession, or series of confessions, however one views it, was challenged in the Florida Courts. A decision adverse to the defendant's claim was rendered by the Florida Supreme Court. *Milton v. State*, 125 So.2d 880 (Fla. 1960). The petitioner-defendant has never brought this matter before the federal courts for adjudication. Furthermore, *he has not presented this argument in his petition*. This Court has consistently ruled that matters not raised by the petition are not before this Court for consideration. *Namet v. United States*, 373 U.S. 179

(1963); *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376 (1960); *Lawn v. United States*, 355 U.S. 339 (1958); *National Licorice Company v. National Labor Relations Board*, 309 U.S. 350 (1940); United States Supreme Court Rule 40 (d) (2).

The Federal District Court recognized this vital fact in its own decision, stating:

> "Finally, it should be pointed out that even if the trial judge had excluded this oral confession, the jury would still have had the benefit of an earlier tape recorded confession by Milton, which was played twice at the trial, once out of the hearing of the jury, and subsequently in evidence. This confession was given several weeks prior to the oral confession in the jail cell. Milton was warned of his applicable Constitutional rights before he made the recorded confession. Although Milton argued at his trial that this earlier confession was also involuntary, he has not pressed that claim in this habeas corpus proceeding. 306 F.Supp. 939 (So. Dist. Fla. 1969).

That Court provided the petitioner with a full hearing regarding the voluntariness of the statements to Langford. However, such a hearing was clearly more of a courtesy than a necessity in view of the uncontested earlier confessions. This Court is in the very same position. If the statements of Langford were declared inadmissible, the petitioner would still have failed to establish a basis for a new trial.

II

ASSUMING ARGUENDO THAT THE QUESTION OF THE ADMISSIBILITY OF THE PRIOR CONFESSIONS WILL BE REVIEWED BY THIS COURT, THE VOLUNTARINESS OF THE PRIOR CONFESSIONS WAS APPROPRIATELY DETERMINED BY PROCEDURES SPECIFICALLY AUTHORIZED BY THIS COURT.

The State would reiterate that (1) the petitioner was advised of his rights prior to interrogation; (2) the prior confessions were deemed admissible by the State Courts; (3) they were not subsequently challenged in the Federal Courts; (4) thereby making the issue of the voluntariness of the statements to Langford academic. If, however, the issue of the voluntariness of the earlier confessions is to be reviewed by this Court, the validity of the Circuit Court's ruling is clearly demonstrable.

It is extremely important to note that the State trial court employed a procedure approved by this Court in *Jackson v. Denno*, 378 U.S. 368 (1964) for determining the voluntariness of the earlier confession. A procedure was employed by the Dade County Circuit Court Judge which was designed to give the defendant every fundamental consideration of fairness. It is worth mentioning that this procedure had been outlined by the Florida Supreme Court in *Graham v. State*, 91 So.2d 662 (Fla. 1956), a full five years before *Jackson v. Denno*, and remains today as the appropriate procedure for determining voluntariness of confessions.

First, the Judge excused the jury and heard extensive testimony on both direct and cross from both prosecution and defense before determining that the confession was voluntary. The Judge then submitted the confession to the jury to allow them to decide what weight, if any, should be given to the confession. He specifically told them that they could disregard the confession if they felt it was involuntary. Finally, the Judge instructed the jury that if they did believe the confession to be voluntary, they should nevertheless, consider it with great caution (R. 642).

The petitioner was unsuccessful in his attack upon that earlier confession in proceedings before the Florida Supreme Court. That Court correctly reconstructed and approved of the procedures employed in the trial court. Obviously the petitioner was unable to challenge in the Federal Courts a procedure specifically approved by the United States Supreme Court. No challenge to that procedure was raised in the Federal Courts, nor is any challenge to that procedure raised by the petitioner for a writ of certiorari addressed to this court, *nor is the procedure in any way challenged by the brief of counsel for the petitioner.*

In the absence of any allegations or prior determination that the trial court's procedure constituted error, the voluntariness of the earlier confession has been settled. Therefore, it is not necessary to inquire into the voluntary character of the earlier confession once again.

Counsel for petitioner does seek to challenge the voluntariness of that confession. *He does so without challenging the procedure employed to arrive at the conclusion on the trial level.* The State would suggest that this omission is fatal to his argument, and that the judgment that the earlier confession was voluntary must stand. Nevertheless,

we will discuss that testimony which supported the conclusion on the trial level.

When the State was about to introduce the defendant's confession, the jury was excused (R. 387). The court then conducted a lengthy hearing and heard the evidence on both sides (R. 387-505). The evidence presented to the court outside of the jury's presence established that William P. McClure and Warren D. Holmes, both detectives in the Miami Police Department were present when the defendant confessed on June 11, 1958. Holmes testified that he began questioning the defendant on June 11, 1958, at 4:58 in the afternoon (A. 109; R. 422-423). At the commencement of the interview Holmes advised the defendant that he was inquiring into the death of the deceased, Minnie Claybon, that he, the defendant, had the right to counsel and did not have to answer any questions unless he wanted to (A. 110; R. 423). The defendant was asked if he understood and he responded that he did (A. 110; R. 424). From five o'clock until six-thirty Holmes discussed boxing with the defendant. The defendant stated that "people thought he was going to be a second Joe Louis". After detective McClure arrived the defendant was questioned for approximately one hour, between 6:30 p.m. and 7:30 p.m., when Holmes and McClure went to dinner. The defendant expressed the desire to remain in Holmes' office rather than be returned to his cell and that request was granted (A. 111; R. 424-425).

The officers returned at 8:30 p.m., and brought the defendant some hamburgers and a bottle of coca-cola (A. 111; R. 425). At 8:30 p.m. the interview was resumed by Holmes while McClure remained in an observation room watching and listening to the examination. Holmes ex-

plained that there was a tape recorder that could be turned on from the observation room. Holmes further testified that the defendant was not threatened, mistreated, or offered any reward or promise of leniency in order to secure the confession (A. 111; R. 424-425). McClure testified that he saw the defendant on the day in question, namely, June 11, 1958 at approximately 6:30 p.m. when he observed for a few minutes from the observation room the discussion between Holmes and the defendant (A. 92; R. 386). McClure corroborated the time schedule testified to by Holmes. McClure testified that when he observed the defendant he appeared "very relaxed", "seemed to be comfortable", and "was answering questions easily" (A. 93; R. 387). McClure corroborated Holmes' testimony about leaving for dinner and that they brought the defendant two hamburgers and a coca-cola (A. 93; R. 388). McClure also corroborated Holmes' testimony that the defendant preferred remaining in Holmes' office which was more comfortable than his cell and that the request was granted (A. 93; R. 388).

McClure advised the defendant when he first spoke to him at 6:30 p.m. of the nature of the inquiry and that the defendant would not have to answer any questions and that his answers could be used against him in future court proceedings. According to McClure the defendant answered the questions without refusal (A. 94; R. 389). McClure remained in the observation room and turned the recording machine on at approximately nine o'clock when the interview began to treat the case at hand (A. 96; R. 390-391). McClure testified that the defendant expressed a desire to tell his story and get it off his chest so that he could clear himself with God. McClure's testimony reads as follows (A. 96; R. 392):

> "I walked into the room and I said, 'Hello, George.' George said, 'Hello, Mr, McClure.' I sat down and he started to tell me, 'Mr. McClure, I want to tell you this, I want to get it off my chest. It is been on my mind for a long time, and I would like to clear myself with God'.—words to that effect."

The defendant then confessed the killing of Minnie Claybon. After the defendant confessed he was requested to repeat the story to a stenographer who would prepare a written statement (A. 96; R. 393). The defendant was once again warned of his constitutional rights and his confession was recorded by a stenographer (A. 96-97; R. 393-394).

The stenographer transcribed the confession while in the interim the defendant was taken to a physician for an examination. (A. 97; R. 394). Upon returning, the prepared statement was read aloud to the defendant, he read it again himself and initialed typographical errors. The defendant was told to initial each page if it was correct and sign the entire statement at the end if the entire statement was correct. The defendant was also told to write a statement in his own handwriting indicating that the statement was true (A. 97; R. 394). McClure testified that the defendant signed the statement and followed the procedure described (A. 97; R. 394). It was made extremely clear by McClure that there were no offers of reward or threats made in order to secure the defendant's confession.

Doctor Joseph H. Davis, Medical Examiner for Dade County, testified that he was requested on the evening of June 11, 1958 to examine the defendant. Dr. Davis testi-

fied that he performed a physical examination of the defendant which lasted approximately ten minutes. Dr. Davis testified that the defendant freely submitted to the examination (R. 417). Dr. Davis asked the defendant if he had been abused in any way and the defendant stated "No". Dr. Davis explained that the defendant was thoroughly examined and had not been physically abused (R. 418). Dr. Davis further testified that the defendant appeared mentally normal, quiet, reserved and showed no signs of being under emotional strain. Dr. Davis further testified that the defendant stated to him that he felt better since he had told the police the truth (R. 418). Dr. Davis' testimony in part reads as follows (R. 417-418):

"A He said it was all right to examine him.

Q What did you do?

A I examined him. First I asked if he had been abused in any way. He said no. I asked him to take off his shirt and I examined him from the waist up, and I saw no marks of injury. As I recall, he put his shirt back on and took his trousers and underdrawers off and I examined the lower half of his body and saw no marks or any evidence of injury.

Q Did you have any further conversation with him at that time?

A Yes. In the course of the conversation, he himself told me that he felt better that he had told the truth. Now, I did not go into details with him as to what he said or what truth he had told, but that in essence is what he said.

Q In your opinion as a doctor, do you feel that George Milton was in any way harmed when you were examining him?

A No, I saw no evidence of injury.

Q How did he appear mentally to you?

A Mentally, perfectly all right. He was quiet, reserved. I didn't see anything particular about him that would lead me to suspect he was under any particular emotional strain."

Detective Shepherd of the Miami Homicide Bureau testified that he spoke to the defendant for the first time on June 1, 1958 (R. 486). On that date the defendant complained of a shoulder injury and was taken to the hospital and not turned over to the police until June 2, 1958 (R. 492). Shepherd testified that he only questioned the defendant on two occasions (R. 487). On the first occasion, June 1, 1958, the questioning lasted for 20-30 minutes (R. 488). On the second occasion, on June 6, 1958, the interrogation was lengthy and lasted for approximately six hours (R. 488), but on cross-examination Shepherd explained that the six hour questioning dealt with an entirely different case. Shepherd explained that the defendant was being held on instructions from Bartow, Florida as well as on instructions from the State of Mississippi where there was an outstanding warrant for the defendant (R. 494-495). Cross-examination of detective Holmes established that he questioned the defendant on three occasions, namely, June 3rd, 4th and the 11th, 1958, when the confession in issue was taken (A. 115; R. 426). The questioning on June 3, 1958 actually was conducted by two doctors who administered truth serum to the defendant and spoke to him for approximately forty-five minutes.

(A. 112; R. 427). On the occasion of June 4, 1958, the defendant was questioned with the aid of a polygraph, commonly referred to as a lie detector, from 1:15 to 2:30 in the afternoon (A. 114; R. 429). McClure testified that he questioned the defendant twice, that is, on June 11, 1958 and on June 5, 1958 for a period of one and one-half hours. (A. 98; R. 396).

The defendant testified before the court and gave his version of the circumstances attending the taking of his confession. The defendant claimed that he was questioned for long hours almost every day after he was taken into custody on June 1, 1958 (A. 123; R. 444-446). The defendant's testimony, however, reveals that he could only recall being questioned specifically on June 3, 1958 which he states is the first time that he was questioned, and on June 4, 1958, and on June 11, 1958 (A. 123; R. 447). The defendant testified that he was given drugs on June 3, 1958 and underwent a polygraph test on June 4, 1958 (A. 124; R. 448-449). The defendant testified that Holmes accused him of not telling the truth and threatened him that he would be taken for a ride in the country (A. 127; R. 452-453). The defendant claims that he was scared and that Holmes actually twisted his arm and pushed him around the room and continued threatening him and that it was under these circumstances that he confessed (A. 127-128; R. 453-457). The defendant also claims contrary to the testimony of Dr. Davis that he was not physically examined but merely asked how he felt (A. 131-132; R. 461-462). On cross-examination the defendant denied stating the matters and things that the tape recording, which was played to the court, reflects that he did say (A. 135; R. 467-468). The defendant also claims that McClure and Holmes did not bring him hamburgers and a coke (A. 138; R. 473).

The court was deeply concerned with this conflicting testimony and questioned the defendant (A. 139-144; R. 475-483). The court was apparently interested in the number of times the defendant was questioned, but *the defendant could not tell the court any time that he was questioned other than on the third, fourth and eleventh* of June, 1958. The defendant's answers to the court were indeed evasive. Exemplary of that is the following (A. 141-142; R. 478-479):

"THE COURT: You weren't questioned between the 4th and the 11th?

THE WITNESS: I could have been.

THE COURT: Not could have been. Were you or weren't you? You were there, you know about it. You are the only one that can tell us.

THE WITNESS: From the fourth day to the eleventh, I believe that I was questioned. I mean, I was trying to think. I believe that I was questioned some time during the time from the 4th to the 11th of June, but I just remember the 11th.

THE COURT: Well, do you know anybody that questioned you between the 4th and the 11th, anyone of the detectives anybody else, anywhere, anytime, between the 4th and the 11th? You tell me if anybody did that, and, if so, when and for how long a time.

THE WITNESS: I will try and remember the best I can. During the time I remember being

questioned, but I was questioned lots of times. I just can't say directly how long each time because —

THE COURT: Just tell me one time between the 4th of June and the 11th of June on which you were questioned. Just one time, and by whom.

THE WITNESS: Detective Shepard, I believe, sir.

THE COURT: What day did he question you, if you remember?

THE WITNESS: I don't remember what day.

THE COURT: For how long a period of time?

THE WITNESS: Maybe an hour, hour and a half.

THE COURT: Maybe an hour or an hour and a half. Is that the only time you remember between the 4th and the 11th?

THE WITNESS: That I remember, sir."

At the conclusion of this lengthy hearing outside the presence of the jury the trial court concluded that the confession was admissible and pointed out specifically that the court had carefully observed the defendant's demeanor and was convinced that the confession was voluntarily given. The court's observation is couched in the following language (R. 497):

"—From listening to the testimony, I might say, particularly after looking at your defendant testifying, observing him while he was testifying, observing his demeanor on the witness stand, and listening very carefully to his testimony throughout, I am convinced that the statement that he had given in this case was one of a voluntary nature."

III

ASSUMING ARGUENDO THAT THIS COURT DOES REVIEW THE EARLIER CONFESSIONS AND DOES DECIDE THAT THE INAPPROPRIATE PROCEDURES WERE EMPLOYED TO DETERMINE THE VOLUNTARY NATURE OF THOSE EARLIER CONFESSIONS, THE PRINCIPLE OF RIGHT TO COUNSEL ENCOMPASSED BY *MASSIAH* SHOULD NOT BE EXTENDED TO APPLY TO PETITIONER'S LATER CONFESSION TO ARCHIE LANGFORD.

A. The main doctrine of the *Massiah* decision was that the defendant's right to counsel had been violated. The strong dissent of three justices, authored by Justice White, pointed out that a substantial minority of the Court had serious doubts as to whether or not there was any violation of the right to counsel in *Massiah*.

With that strong dissent in mind, the State would suggest that there is no justification for an extension of *Massiah* beyond that immediate factual situation. To apply the holding in *Massiah* to these facts would constitute an

unwarranted extension of the doctrine of right to counsel. It would seriously undermine the ability of the State to introduce any evidence volunteered by a defendant.

The situation in *Massiah* was one in which the defendant had a conversation with a co-defendant who was well known to him. He knew that he was not conversing with a stranger wherein the risk of disclosure would be apparent. In this case, the defendant, Milton, was conversing with a total stranger. He *volunteered* the information to that stranger. The fact that this individual was a policeman is immaterial, since this stranger could just as well have testified against him if he were a bona fide prisoner..

An extension of *Massiah* to this situation, or to similar situations, would create absurd consequences out of the specific holding in that case. If Archie Langford were not a police officer, but turned State's evidence, would his testimony have been inadmissible? If a prison guard asked the defendant a question, received an answer, and then testified in Court, would this be a violation of the Sixth Amendment rights of the defendant? What if a policeman standing in the corridor overheard the defendant answering the question of a cellmate? Would that information be inadmissible as a violation of the right to counsel?

It should be apparent from the questions above and the implied answer, that the mere absence of counsel on a particular occasion should not render a statement inadmissible. Any extension of that basic doctrine beyond the fact pattern of *Massiah* would create a highly undesirable precedent.

B. It must be noted that an extensive hearing was granted to the petitioner in regard to the voluntariness of his confession. (R. 387-505) This procedure employed by the trial court, as in the case of the other confessions was totally consistent with the principles outlined by this Court in *Jackson v. Denno*, supra. Petitioner has failed to effectively challenge those procedures.

C. At the time of the hearing on the voluntariness of the confession, petitioner contradicted the very facts regarding the voluntariness of the confession which he now asserts as a basis for relief. He claimed that Officer Langford asked him about the crime only *once* (R. 324, 327). He stated that no coercion or pressure of any kind had been exercised.

The petitioner presents no explanation for his implied repudiation of his own testimony. Further, he presents no authority for the proposition that a defendant may allege one version of the facts at trial, and different version of the facts to suit his appellate purposes. Any relief granted to the prisoner under such circumstances would have to be either (1) based on the wrong set of facts, or (2) a reward for perjury.

IV

IF THIS COURT DEEMS IT NECESSARY TO CONSIDER THE *MASSIAH* DECISION, DESPITE THE PRECEEDING ARGUMENTS, THE PRINCIPLE OF THE NON-RETROACTIVITY OF *MASSIAH* SHOULD BE UPHELD.

A. The petitioner's request for a retroactive application of Massiah is couched in rather strange language. He argues that a "normal," that is, retroactive, application should be approved. It is obvious, however, that a normal application of any legislation or court ruling is prospective. Of the vast number of precedent setting judicial decisions, only a handful have been applied retroactively.

Therefore, petitioner is asking this Court to establish an exception, rather than follow a rule. However, he has failed to establish any sound basis for that exception. At least four Federal Circuits have expressly ruled against retroactive application of *Massiah*, and none have ruled otherwise. The Fifth Circuit has so ruled in *Milton v. Wainwright*, supra. (1970) and earlier had applied the non-retroactivity principle to *Lyles v. Beto*, 363 Fed.2d 503 (1966). The Third Circuit followed this ruling in *U.S. ex rel. Allison v. New Jersey*, 418 F.2d 332 (1969), and in *U.S. ex rel. Dickerson v. Rundle*, 430 F.2d 462 (1970). The Second Circuit had ruled similarly in *U.S. ex rel. Romano v. Fay*, 360 F.2d 389 (1966). The Seventh Circuit in *U.S. ex rel. Long v. Pate* agreed, and accurately stated the test to be applied:

> "Basing our decision on the extent which the condemned practice affects 'the integrity of the truth-determining process,' Johnson v. New Jersey, 384 U.S. 719, 729, 86 S.Ct. 1772, 1779, 16 L.Ed. 2d 882 (1964), and weighing such finding against the prior justified reliance upon the old standards and 'the impact upon the administration of justice', Stovall v. Denno, 388 U.S. 293, 298, 87 S.Ct. 1967, 1970, 18 L.Ed. 2d 1199 (1967), we agree with the other circuits which have faced the question of *Massiah's* retroactivity, and hold it to be not retroactive." 418 F.2d 1028

It is important to note that the question is not, therefore, largely undecided as petitioner contends. It has been decisively decided against the petitioner. Also worth emphasis is the judicial notice given to prior reliance upon the investigative practices at issue in both the passage cited immediately above, and in the *Milton* decision rendered by the Fifth Circuit. In *Milton* the Court pointed out that the techniques employed had been approved in *Young v. United States*, 107 F.2d 490 (5th Cir. 1939). This, creates serious doubts about petitioner's assertion that this was not a common practice. The fact would appear to be that surreptitious methods of investigations were quite common, and that retroactive application of *Massiah* would result in a plague of appeals by those previously incarcerated based upon assorted types of confessions. This Court also recognized these heretofore acceptable practices in *Johnson v. New Jersey*, 384 U.S. 719, 731:

> Prior to Escobedo and Miranda, however, we had expressly declined to condemn an entire process of in-custody interrogation because of such conduct by the police. See *Crooker v. California*, 357 U.S. 433, 2 L.Ed. 2d 1448, 78 S.Ct. 1287 (1958); *Cicenia v. Logay*, 357 U.S. 504, 2 L.Ed. 2d 1523, 78 S.Ct. 1297 (1958). Law Enforcement authorities fairly relied on these prior cases no longer binding, in obtaining incriminating statements during the intervening years preceding Escobedo and Miranda.

The petitioner seeks a reversal of every Circuit which has ruled on this question. He further desires that in this case, a rare and abnormal procedure be applied, namely retroactive application of a case to an earlier cause. His

reasons for reversing the unopposed view of four Circuit Courts, and for applying an extremely rare doctrine are based upon highly questionable distinctions. The arguments he presents are based upon no apparent authority. His intricate argument based upon his own premises establishes at most some partial correlations. These partial and coincidental correlations in no way reveal the basis for the application of retroactivity.

This Court has been quite explicit on the subject. In *Johnson v. New Jersey*, 384 U.S. 719, 728, (1966), this Court stated:

> "[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved."

There is, then, no magic formula, no precise mathematical correlation, which permits us to determine when retroactivity might be permitted. However, there were standards set forth by this Court, and these standards do not correspond completely to those asserted by the petitioner. In *Desist v. United States*, 394 U.S. 244, 249 (1969) these helpful guidelines were presented:

> "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law

> enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Applying the standards of *Stovall v. Denno*, supra; *Johnson v. New Jersey*, supra., and *Desist*, four Circuit Courts decided that Massiah should not be applied retroactively. Petitioner has failed to effectively challenge the rationale, the application of facts to those rationale, or the final results of those decisions. Likewise, the warnings required by *Miranda v. Arizona*, 384 U.S. 436, (1966), the ruling in *Escobedo v. Illinois*, 378 U.S. 478, (1964), and the right to counsel at pretrial identifications, *Gilbert v. California*, 388 U.S. 263, (1967); *United States v. Wade*, 388 U.S. 218, (1967), have been held prospective due to official reliance on previous standards and the potential burden to the judicial system.

The question of retroactivity will also be afforded by the availability of other means of evaluating the truth of a confession. Refusing to apply *Miranda and Escobedo* retroactively, this Court said in *Johnson v. New Jersey*, 384 U.S. at 729

> "We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial."

With this in mind, it is important to recall that the State trial court provided the petitioner with ample protection. There was first a hearing before the judge, and then a second determination of the voluntariness by the jury.

The petitioner in a habeas corpus proceeding is entitled to present evidence anew on the voluntariness of confessions, *if* a full and fair hearing has not been afforded previously. *Townsend v. Sain*, 372 U.S. 293 (1963). The Fifth Circuit has ruled that a full and fair hearing was afforded in this case. *Milton v. Wainwright*, 428 F.2d 463 (1970). *The petitioner has not even alleged*, let alone proved, the invalidity of that ruling. Therefore, there would clearly seem to be no basis for new relief to be granted to the petitioner.

B. There is still another reason for affirming the non-retroactive application of Massiah.

It is crucial to note that any Massiah situation would by its very nature have to fall within the province of Escobedo and Miranda as well. Since *Escobedo and Miranda* are *not* retroactive, a new ruling in favor of the retroactivity of *Massiah* would result in hopeless confusion (and perhaps some legal schizophrenia).

V

A REVIEW OF THE PROCEDURES EMPLOYED IN THE LOWER COURTS EXPLICITLY SUPPORTS THE CONCLUSION THAT DEFENDANT'S STATEMENTS TO ARCHIE LANGFORD WERE VOLUNTARY AND ADMISSIBLE.

Once again, it should be pointed out that even if there were authority for the proposition that petitioner's confessions to Langford were involuntary, the earlier confessions recorded by Officers Holmes and McClure still stand.

Therefore, admission of Officer Langford's testimony would merely be harmless error. Whether that authority would be *Massiah*, or *Davis v. North Carolina*, 384 U.S. 737 (1966) as petitioner contends alternatively, the same conclusion applies.

Petitioner's second point requests an evaluation of the voluntary nature of his confession applying the test set forth in *Davis*. This is, indeed, a curious argument in view of the petitioner's testimony at his trial. At the trial *Milton explicitly denied that any kind of physical or psychological pressure had been exerted.* In fact, he said that Langford had only raised the question of the crime one time. The pertinent passages appear below:

> Q Did you ever talk to him about the facts of your case?
>
> A I never mentioned anything except he only mentioned it once, to be honest and truthful. He only mentioned it once; just one time.
>
> Q Did he ever mention, "What are you in jail for?"
>
> A I said, "Well, it is bad enough as it is. I don't want to talk about it. That was the only time he even mentioned it. After that— (A. 57; R. 324)
>
> * * *
>
> Q During that course of time, did he ever wake up in the night to talk to you?
>
> A No, we never talked at night whatsoever. Matter of fact, I always be just setting down thinking, I mean, we never even talked too much, to be honest and truthful about it. We never

talked too much about anything and he only mentioned it once, about my case. I just told him just like it were. I was feeling bad enough. (A. 58; R. 326-327)

* * *

THE COURT: Did he ever threaten you in any manner while he was in there?

THE WITNESS: No.

THE COURT: Did he ever promise you anything?

THE WITNESS: We never talked.

THE COURT: Did he promise you anything if you would do any talking, regardless of whether you said anything or not?

THE WITNESS: He didn't make any promise to me whatsoever. (A. 59; R. 327)

The petitioner's own version of what had happened in the cell is totally inconsistent with his current argument that the guilty plea was coerced. He seeks on appeal to assert facts which he, himself, denied at the trial. On this basis alone, the adjudication of the voluntariness of the confession should be upheld.

It should also be affirmed because neither the facts in *Davis v. North Carolina*, nor the rule promulgated therein, dictate a reversal. In the *Davis* case this Court pointed out that when a full and fair hearing has *not* been held regarding the voluntariness of a confession, new

evidence may be presented as to voluntariness. This Court cited *Townsend v. Sain*, 372 U.S. 293, (1963) for that proposition. Under those circumstances Davis was entitled to obtain a review of the voluntariness of his confession.

It must be noted that Davis had not been afforded the same procedural safeguards afforded by the State of Florida to the petitioner Milton. In *Davis v. North Carolina*, 253 N.C. 86, 116 S.E. 2d 365 (1966), it was pointed out that the question of the voluntariness of the confession was *not* resubmitted to the jury for their consideration as to voluntariness. At Milton's trial, both judge and jury dealt with that issue, and decided it in a manner adverse to the petitioner. In view of this important difference, it was certainly appropriate for the lower courts to uphold the findings of the trial court.

The facts in *Davis* are also quite different. There is strong evidence in that case of physical pressures being placed upon the prisoner. During his period of incarceration, the prisoner lost 15 pounds. This was primarily due to a limited diet consisting of little more than two sandwiches per day. Secondly, the prisoner in that case was taken by police officers to the scene of the crime—a graveyard—in a dramatic 5 a.m. confrontation, and on a second occasion as well.

To establish that the confession was involuntary, petitioner must meet the test established by this Court's innumerable early decisions. The basic requirement is that a confession must be the product of rational intellect and free will rather than being induced by conduct of state officials which might tend to overbear the defendant's

will to resist, thus constituting coercion. *Townsend v. Sain*, 372 U.S. 293 (1963); *Bynum v. State of Illinois*, 373 U.S. 528 (1963); *Rogers v. Richmond*, 365 U.S. 534 (1961).

Viewed from the defendant's own testimony at the trial there is no possible way to infer that his statements were the product of coercion. Viewed from the standpoint of the State's witness, Archie Langford, there is little that could support such a conclusion. Langford was "armed" with candy bars, offers of shared oatmeal, and absurd accusations (such as the accusation that Milton had raped his own wife). Despite petitioner's valiant efforts to conjure out of those bare facts the framework for a coerced confession, no overbearing pressure is apparent. There was no exertion of any type of physical force. There were no threats and no promises. There was no grueling or extensive questioning.

Petitioner seeks to bolster his argument by reference to violation of a Florida Statute (901.23). Certain correlative facts, however, must be related to the State's failure to take the prisoner to a magistrate immediately. After the prisoner was hospitalized and then incarcerated for this particular crime, the police were asked to hold him for investigation in regard to other matters for both Polk County, Florida and the State of Mississippi. (R. 494-495). This must be coupled with rulings of Florida, and the Fifth Circuit Court of Appeals, that mere violation of that Statute does not of itself establish that evidence obtained in the interim was involuntary. *Young v. Wainwright*, 326 F.2d 255 (5th Cir. 1964); *Milton v. Cochran*, 147 So.2d 137 (1963), certiorari denied 375 U.S. 869.

CONCLUSION

For the reasons stated, the respondent prays that the judgment below be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished by mail to PROFESSOR NEIL P. RUTLEDGE, Duke University Law School, Durham, North Carolina 27706, this ____ day of October, 1971.

J. ROBERT OLIAN
Assistant Attorney General